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No. 91-615

In The

Supreme Court of the United States

October Term, 1991

ALLIED-SIGNAL, INC.
as successor-in-interest to
The Bendix Corporation,

Petitioner

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unitary business principle permits a nondomiciliary state to tax a multistate corporation on income derived from a minority stock investment when the investment is integral to the corporation's operational strategies of enhancing the corporation's existing businesses and diversifying into other businesses through the acquisition and divestiture of other corporations.

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COUNTERSTATEMENT OF THE CASE

A. Bendix' Acquisitions and Divestitures

Petitioner's predecessor-in-interest The Bendix Corporation ("Bendix") was incorporated in 1929 as a manufacturer of aviation and automotive parts (Stip. ¶7)* and in 1937 received a certificate of authority to do business in New Jersey (Stip. ¶8).

At least as early as 1965, Bendix began a program of growth and diversification through the acquisition and occasional divestiture of other corporations. In 1965, Bendix bought the stock of United Geophysical Corporation ("UGC") (Stip. ¶69). According to its Annual Report to Shareholders for that year, Bendix was in the process of accelerating its acquisitions program with the intent not merely of diversifying but also of achieving a better balance between its military and nonmilitary sales. The UGC investment was thought to be complementary to Bendix' oceanics endeavors (Stip. ¶70). UGC's business was seismic surveying (Stip. ¶71), a business in which Bendix had not previously engaged (Stip. ¶73).

In 1966 Bendix made seven acquisitions, including three corporations in the machine tool industry, one in the automotive industry, one which made medical electronics equipment for doctors, a corporation involved in applied oceanography, and a fiber optics producer (Stip.

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* The designation "Stip. ¶___" refers to the parties' stipulation of facts filed in the Tax Court of New Jersey, relevant portions of which are included (without exhibits) in the appendix to this brief.

¶132). In 1967 Bendix acquired five companies and disposed of its marine division (Stip. ¶¶133, 134). These acquisitions involved the automotive industry, machine tool industry, and Texas Pipe Bending Company, which manufactured welded pipe (Stip. ¶133). In 1968 Bendix or its subsidiary Fram Corporation (acquired the previous year) made five acquisitions in various industries ranging from automotive parts to rubber products to vacuum systems (Stip. ¶135). During 1969 Bendix or its subsidiary Fram Corporation made six acquisitions including two machine tool companies, a company making glass for the automotive industry, the remaining stock of Aviation Electric, Ltd., the remaining stock of Bendix-Westinghouse Automotive Air Brake Company, and Skagit Corporation, which manufactured logging and handling equipment (Stip. ¶137). In the same year Bendix disposed of three businesses (Stip. ¶138).

Summarizing Bendix' strategies to date, its then chairman of the board stated in the 1969 Annual Report to Shareholders that diversification in order to make Bendix less dependent on the government sector had been one of Bendix' goals and that the company's growth during the past 10 years had been achieved in significant part through acquisitions (Stip. ¶136).

In 1970 Bendix acquired and then merged with the American Forest Products Corporation. AFPC (which became Bendix Forest Products Corporation) was in the timber management, lumber, building materials, wood and corrugated containers, and aluminum siding businesses (Stip. ¶139). Like the prior acquisitions of UGC and Skagit Corporation, the acquisition of AFPC represented a new departure and a new business for Bendix

(Stip. ¶130). AFPC was Bendix' largest acquisition to date (Stip. ¶139) and established an entire major operating group for the company (Stip. ¶¶11, 13). In 1971 Bendix made six small acquisitions and acquired a 50% interest in two European companies (Stip. ¶140).

The chairman's message in the 1972 Annual Report to Shareholders mentions the goal of expanding Bendix' role in countercyclical markets (Stip. ¶141). The principles of diversification and involvement in countercyclical markets were further described in Bendix' 1973 Annual Report to Shareholders (Stip. ¶143). The 1975, 1976 and 1977 Annual Reports reiterate the themes of diversification and less dependence on government contracts (Stip. ¶¶144, 146, 147).

In 1973 Bendix purchased Boise Cascade's international mobile home and recreational vehicle businesses, which became Bendix Home Systems, and purchased the Autolite spark plug manufacturing facility and the Autolite trademark from the Ford Motor Company (Stip. ¶142). In 1977 Bendix acquired Coin Millwork, a maker of wood moldings (Stip. ¶147). This acquisition was consistent with Bendix' strategy for its forest products group to integrate forward in the distribution chain (Stip. ¶¶29, 129).

In fact, there was a clearly articulated goal, which translated into an acquisitions strategy, for each of Bendix' major groups. By 1978, these major groups consisted of the automotive group, aerospace group, forest products group, and industrial-energy group (Stip. ¶¶11, 148). In aerospace Bendix was primarily a subcontractor of aviation components (Stip. ¶163). Its long-term goal for

that segment of its business was to move into the production of whole systems (Stip. ¶29).

In 1978 Bendix acquired a company for its automotive group, acquired two small companies in the aerospace-electronics area, and sold a portion of Bendix Home Systems (Stip. ¶149). Additionally, during that year, Bendix made its largest investment to date, the purchase of 20.6% of the shares of ASARCO, Inc. for approximately $127.6 million (Stip. ¶¶150, 52). As was true of its earlier acquisitions of UGC, Skagit, and American Forest Products Corporation, the ASARCO investment represented a diversification for Bendix; prior to that date, the company had no involvement in the nonferrous metals industry (Stip. ¶150).

During 1979 Bendix continued its strategy for the forest products group of moving forward in the distribution chain with the acquisition of Bass & Company, a producer and distributor of building materials, and the acquisition of the Caradco Division of Scoville, a producer of windows and sliding doors (Stip. ¶152). In that year's letter to shareholders, the then chairman summarized Bendix' strategy as one of "diversification aimed at insulating the Company's total profitability from the cyclical troubles of any particular industry or business," combined with an effort to seek out "high return, high growth segments" of Bendix' markets (Stip. ¶151). In 1980 Bendix purchased a machine tool manufacturer for $300.7 million (Stip. ¶153).

During 1980, Bendix' management determined to focus the corporation more heavily on the high technology aspects of its existing businesses, to acquire high

technology businesses, and to dispose of certain of its noncore businesses (Stip. ¶154). Implementing this shift in strategy, Bendix sold Skagit Corporation in 1980 (Stip. ¶153), took steps to sell its other noncore businesses (T69-24 to T70-7),* specifically those included in its natural resources group (Stip. ¶155), established an Advanced Technology Center (Stip. ¶154), set up a technical ventures group to evaluate and recommend certain relatively modest acquisitions of high technology businesses (Stip. ¶30), took stock positions (some of them sizeable) in high technology companies, specifically RCA, Gould, Lockheed and General Dynamics (T96-24 to T97-7), and established within the Bendix planning department a screening program to select a major acquisition candidate in a high technology business (Stip. ¶30). The screening program lasted for nearly two years and led to the selection of Martin Marietta Corporation as the acquisition candidate (Stip. ¶30).

Consistent with its shift in strategy away from natural resource businesses and into high technology, Bendix sold its natural resource companies in the 1981 fiscal year. Dispositions during this period included Bendix Forest Products Corporation for $435 million, UGC for $80 million, Bass, Caradco and Modern Materials for a total loss of $12.5 million, and Bendix' stock in ASARCO for $336 million (Stip. ¶156).

Summarizing Bendix' investments in the forest products business and ASARCO, William Agee, Bendix' chief

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* The designation "T" refers to the transcript of the deposition of W.M. Agee, chairman of Bendix from 1977 to 1983, which was stipulated into evidence.

executive officer, stated in the 1980 Annual Report to Shareholders that both investments were part of Bendix' strategy "of diversification as an insulator against the cyclicality of any particular business. . . . " (Stip. ¶158).

Bendix' immediate use of a portion of the cash proceeds generated by its 1980 and 1981 dispositions was the repurchase of some 4 million of its own shares (Stip. ¶160) for approximately $257.5 million (Stip. ¶127). In addition, the influx of cash created liquidity and additional debt capacity to enable Bendix to make a sizeable acquisition in the event an appropriate acquisition candidate materialized (Stip. ¶161).

In August 1982, Agee requested authorization from the Bendix Board to make a tender offer for up to 50% of the shares of Martin Marietta Corporation (Stip. ¶162). Bendix viewed the proposed acquisition of Martin Marietta as consistent with the company's long-term goal for the aerospace group of moving into the production of entire systems and subsystems rather than remaining a subcontractor of component parts (Stip. ¶¶29, 163). Agee's memorandum to the Bendix Board states that the combination of Bendix and Martin Marietta would convert Bendix to a company "predominantly engaged in aerospace/electronics activities" with less exposure to the automotive market. The acquisition was unsuccessful and led to Bendix becoming a subsidiary of Allied Corporation (Stip. ¶¶164, 165).

B. Purchase of ASARCO Stock

Bendix began planning for an acquisition in the natural resources area in the spring of 1977. In April of that

year Agee received a memorandum from the Bendix planning department presenting a survey of natural resource companies, primarily mineral companies (Stip. Exhibit D). The memorandum mentions three possible forms for the acquisition. The summary notes that natural resource companies tend to be countercyclical to the overall economy and would "offer Bendix an opportunity for diversifying. . . . " By the spring of 1978, Bendix had acquired on the open market 4.9% of the stock of ASARCO (Stip. Exhibit F).

At the end of March 1978, Agee presented to the long-range planning committee of the Bendix Board a memorandum, authored by the head of the company's planning department with input by Agee, on long-range growth and acquisition planning for the company (Stip. ¶44; Stip. Exhibit E; *see* App. A at 5a-6a; App. B at 37a-40a).* The memorandum begins by stating that company's financial and managerial strength "warrant several major moves aimed at growth and diversification for the 80's" and then lists four possible steps, three of them involving Bendix' existing businesses and the fourth involving "investment in other basic resources that are now depressed and undervalued but that offer strong profit possibilities for the 80's." Fruitful areas for acquisition included "greater involvement in basic resources. . . . " The memorandum then discusses the reasons for acquiring a mining company, which included their undervaluation and the threat of worldwide shortages in basic commodities. Determining that ASARCO closely matches the qualities that Bendix is seeking, the authors state

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* The designation "App. ___ at ___ a" refers to the appendix to the petition for *certiorari*.

that they favor acquiring 20% rather than a majority or 100% of ASARCO's shares. The smaller financial commitment will, they write, permit Bendix to complete its other acquisitions in forest products and industrial energy, and a 20% position will give Bendix "time to become more familiar with the company and the industry before chancing a significantly larger position." The memorandum continues that Bendix will seek representation on ASARCO's Board and with this representation will gain information about the company and the industry preparatory to deciding "whether to enlarge or sell our holdings" (Stip. Exhibit E).

The long-range planning committee approved the acquisition of a 20% interest in ASARCO, and on April 13, 1978, Agee requested approval from the Bendix Board to make the acquisition (Stip. ¶¶46, 47). In seeking Board approval, Agee presented a memorandum dated April 12, 1978 (Stip. Exhibit F, *see* App. B at 40a). The acquisition, according to Agee's memorandum, will aid the company's acquisition strategies, which include reducing Bendix' dependence on the slower growing areas of its business, namely aerospace and the automotive original entry market, generating good cash flow "to meet growing capital needs, particularly in aerospace/electronics . . . ," and broadening Bendix' holdings of basic commodities including forest products and non-fuel minerals.

The Bendix Board approved the proposed acquisition, and Bendix' investment subsequently reached 20.6% of ASARCO's stock. Bendix was able to obtain two seats on ASARCO's 14-member board of directors, which were

filled by Agee and a Bendix outside director (Stip. ¶¶51, 53).

At every board meeting while Bendix held its 20.6% stock interest, the Bendix Board was presented with a summary of ASARCO's earnings and the effect of those earnings on Bendix (Stip. ¶57; Stip. Exhibit I).

During the period that Bendix held 20.6% of the stock of ASARCO, the only contracts between the *operations* of plaintiff and the *operations* of ASARCO were the presence of Messrs. Agee and Baldridge (Stip. ¶53) on ASARCO's Board, a minute amount of sales by ASARCO subsidiaries to Bendix (Stip. ¶62), and quarterly visits by individuals in the Bendix controller's department to ASARCO's headquarters in New York in order to review ASARCO's books to enable Bendix to report the ASARCO investment on the equity method of accounting (Stip. ¶56).

C. Sale of ASARCO Stock

The decision to sell and the sale of Bendix' interest in ASARCO were part of a major restructuring of the company, which was intended to eliminate Bendix' noncore businesses and focus the company more intently in high technology areas (T85-3 to T86-14; Stip. ¶¶64, 154, 155). The noncore businesses that Bendix determined to sell included Texas Pipe Bending, UGC, Skagit, Bendix Forest Products Corporation, and ASARCO (T78-24 to T79-3).

The several divestitures generated cash proceeds of approximately $838.5 million (Stip. ¶156), which were placed in a money market account at Lehman Brothers, Kuhn, Loeb (Stip. ¶117). In the spring of 1981, Bendix

purchased approximately 4 million of its own shares for a total price of $257.5 million, a sum which was withdrawn from the Lehman Brothers account (Stip. ¶¶124, 126, 127). With minor exceptions, the Lehman Brothers account was invested in highly liquid, interest bearing obligations with maturities of less than 90 days (Stip. ¶123). The cash was thus readily available in the event Bendix determined to make an acquisition (T84-11 to 17).

D. The Decisions Below

Relying on *Container Corp. of America v. Franchise Tax Bd.*, 463 *U.S.* 159 (1983) and the New Jersey Supreme Court's decision in *Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation*, 100 *N.J.* 1, 494 *A.*2d 775, *cert.* den. 474 *U.S.* 995 (1985), the Tax Court of New Jersey concluded that the ASARCO investment was part of Bendix' unitary business. The investment was one element in a "well-orchestrated corporate strategy designed to enhance Bendix's current status as well as position Bendix for the future" (App. C at 63a). Consistent with the decisions in *Container (see* 463 *U.S.* at 180 n. 19) and *Silent Hoist*, the Tax Court focused on Bendix' management of the ASARCO investment in concluding that the investment was unitary with the rest of Bendix' operations (App. C at 62a).*

* The New Jersey Tax Court rejected Bendix' argument that the capital gain derived from the sale of its stock in UGC was nonunitary, rejected Bendix' argument that interest earned on the Lehman Brothers account attributable to the proceeds of the Asarco and UCG stock sales was nonunitary, and rejected

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Taking greater note of the unique facts of the case, the Appellate Division of the New Jersey Superior Court affirmed the Tax Court. The Appellate Division pointed to Bendix' analysis of the ASARCO acquisition, described the numerous acquisitions and divestitures and the corporate strategy set out in Bendix' annual reports, and concluded that "Bendix's unitary business included implementation of this policy of acquiring interests in diverse industries to achieve the goals of growth, cyclical protection and corporate balance" (App. B at 44a). According to the Appellate Division, "The record establishes that Bendix acquired assets based on their fit within the framework of existing Bendix operations and their utility as stepping stones to additional acquisitions, and not merely for their capacity to generate income" (*Id.* at 35a).

Emphasizing somewhat different facts, the Supreme Court of New Jersey affirmed the Appellate Division. The Court focused to a greater extent on the role of the sale of the ASARCO stock in Bendix' subsequent attempt to acquire Martin Marietta (App. A at 10a). The Court noted as well the central role played by Bendix' chairman William Agee (*id.* at 4a, 5a, 10a-11a). According to the New Jersey Supreme Court, the facts and "underlying economic realities" must determine the resolution of each unitary business case, and consequently under this

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Bendix' claim that the statutory apportionment formula under the New Jersey Corporation Business Tax Act operated so unfairly as to deprive it of constitutional due process (App. C at 66a). Bendix does not raise these issues in its appeal to this Court.

Court's teachings there is no "per se or bright line standard for defining a unitary business" (*Id.* at 15a). Relying on *Container,* the New Jersey court found the necessary transfers of value in Bendix' "business function of corporate acquisitions and divestitures that was an integral operational activity" (*id.* at 19a) and noted the absence of any such operational strategy in *ASARCO, Inc. v. Idaho State Tax Commission,* 458 *U.S.* 307 (1982) and *F.W. Woolworth Co. v. Taxation and Revenue Dep't.,* 458 *U.S.* 354 (1982) (App. A at 21a).

SUMMARY OF ARGUMENT

This is a fact-bound case not appropriate for plenary review. The record demonstrates that Bendix' investment in 20% of the stock of ASARCO was one step in a longstanding operational strategy that took Bendix from its original business as a manufacturer of aviation and automotive parts to a corporation engaged in the automotive, aerospace, industrial, and natural resource businesses. The record reveals that Bendix purchased and sold the stock of ASARCO as part of its operational strategies. These strategies included the expansion of Bendix' existing businesses through corporate acquisitions designed to accomplish particular operational goals, goals that were specific to each of Bendix' major operating groups. These strategies also included diversification of Bendix' businesses through corporate acquisitions designed to shift Bendix' operations into areas of potential growth and greater profitability.

In light of the unique record, the decision of the New Jersey Supreme Court does not conflict with decisions of other state courts on the unitary business issue. For the same reason, the decision below does not conflict with this Court's unitary business decisions. The record is wholly unlike that before the Court in *ASARCO* and *Woolworth*. The decision below carefully applies the standards established in *Container* finding the requisite "sharing or exchange of value," 463 *U.S.* at 166, sufficient to establish that the ASARCO investment was part of Bendix' otherwise unitary business.

As there is no conflict between the decision below and the decisions of other state courts or the decisions of this Court and as the decision below was correct on the unique set of facts presented, plenary review should be denied.

ARGUMENT

POINT I

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPREME COURT OF NEW JERSEY DOES NOT CONFLICT WITH OTHER STATE COURT DECISIONS.

This Court has cautioned that its role in reviewing a state court decision involving the unitary business principle is limited to determining whether the lower court applied the correct standards and whether the result is "within the realm of permissible judgment." *Container*, 463 *U.S.* at 176. The Court pointed out:

> The legal principles defining the constitutional limits on the unitary business principle are now well established. The factual records in such cases, even when the parties enter into a stipulation, tend to be long and complex, and the line between 'historical fact' and 'constitutional fact' is often fuzzy at best. [*Ibid.*]

This is a good example of such a case. Bendix' long-term strategy of growth and diversification through acquisitions and divestitures, the role of the ASARCO investment in that strategy, and the relationship between the sale of the ASARCO stock and the continuation of that strategy in Bendix' attempt to acquire Martin Marietta present a complex, unique set of facts not conducive to a decision from this Court that would settle the unitary business issue. As the Supreme Court of New Jersey cogently concluded:

> Cases of this nature are the quintessential example of the tenet that facts, not principles of law, decide cases. [citations of authority omitted]. Our decision today should not be read beyond the scope of the facts of the case. [App. A at 24a].*

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* The courts of New Jersey have consistently adhered to this Court's admonition that unitary business cases turn on their facts. *ASARCO*, 458 *U.S.* at 326 n.22; *Container*, 463 *U.S.* at 175-76. *See e.g. International Paper Co. v. Taxation Div. Director*, 11 *N.J. Tax* 147 (Tax Ct. 1990, en banc), aff'd ___ *N.J. Tax* ___ (A.D. 1991), certif. den. ___ *N.J.* ___, ___ *A.*2d ___ (No. 33,784, Oct. 16, 1991) (holding that gain on the sale of a major subsidiary was unitary income but that gain on the sale of stock used as the convertibility feature in an issue of convertible debentures was not); *Mobil Oil Corp. v. Director, Div. of Taxation*, 11 *N.J. Tax* 344 (Tax Ct. 1990), app. pndg. N.J. Super. Ct. App. Div. No.

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Since the facts are so unique, the decision below is not in conflict with other state court decisions. For example, there was virtually no record evidence in *Corning Glassworks, Inc. v. Virginia Dep't. of Taxation*, 241 *Va.* 353, 402 *S.E.*2d 35 (1991), *cert.* den. 60 *U.S.L.W.* 3265 (Oct. 7, 1991, No. 90-1852), ___ *U.S.* ___, of a long-term, consistently pursued, operational strategy of buying and selling other corporations. Nor does the record explain how Corning's formation and sale of Owens-Corning Fiberglas Corp. were integral parts of any such operational strategy. To the contrary, the sale of Owens-Corning was forced upon Corning as the result of a consent decree under the antitrust laws. 402 *S.E.*2d at 36, 40.

Similarly, in *James v. Int'l Tel. & Tel. Corp.*, 654 *S.W.*2d 865 (Mo. 1983), the court found that "the record [did] not support the Director's contention that ITT [was] in the business of buying and selling subsidiaries." *Id.* at 868. That finding was decisive because the question under the Missouri income tax was whether the income in question arose "from transactions and activity in the regular course of the taxpayer's trade or business . . . . " *Id.* at 867. The sale in question was not in the regular course of

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A-2326-90T5 (holding that gain realized on an integrated oil company's forced sale of a minority interest in an oil producing company was not unitary); and *American Home Products Corp. v. Director, Div. of Taxation*, 11 *N.J. Tax* 287 (Tax Ct. 1990), app. pndg. N.J. Super. Ct. App. Div. No. A-4316-90T3 (holding that interest received on short-term interest bearing obligations was not unitary income because the underlying assets were not used as working capital).

ITT's business because it was part of a divestiture pursuant to a consent decree under the antitrust laws.*

Similarly, in *Pledger v. Illinois Tool Works, Inc.*, 306 Ark. 134, 812 *S.W.*2d 101 (1991), *cert.* den. 60 *U.S.L.W.* ___ (Nov. 12, 1991, No. 91-530), there was no evidence of an operational strategy involving the buying and selling of corporations and no evidence that the purchase and sale of the investments at issue were part of such a strategy. *See* 812 *S.W.*2d at 107 (Hays, J., dissenting). Moreover, as in *James, supra*, the issue in *Pledger* revolved around the question of whether the sale of the investments generated business income, *i.e.*, income arising in the "regular course of the taxpayer's trade or business . . . . " *Id.* at 102.

Likewise, in *Brunner Enterprises, Inc. v. Dep't. of Revenue*, 452 *So.*2d 550 (Fla. 1984), there was no evidence whatever of a persistent, integral corporate strategy of buying and selling other corporations. Brunner simply sold stock in an Illinois bank. *See Dep't. of Revenue v. Brunner Enterprises, Inc.*, 390 *So.*2d 713, 714 (Fla. 1980). Accordingly, the Florida court held that *ASARCO* precluded Florida's taxation of the investment income. 452 *So.*2d at 553.

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* The New Jersey Corporation Business Tax Act does not distinguish between business and nonbusiness income. Subject to constitutional constraints, all income is included in the tax base and apportioned according to the standard three-factor apportionment formula. *N.J. Stat. Ann.* § 54:10A-4(k) (West 1986) (App. D at 69a); *see Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation, supra*, 100 *N.J.* at 13-14, 494 *A.*2d at 781. Moreover, New Jersey does not permit combined reporting. *N.J. Admin. Code* tit. 18, § 7-11.15 (1991).

Petitioner is correct that there are differences among state courts in their application of the unitary business principle. Some states, including New Jersey and Maryland (*see e.g. NCR Corp. v. Comptroller,* 313 *Md.* 118, 133-41, 544 *A.*2d 764, 771-75 (1988)), analyze the manner in which an investment is used in an otherwise unitary business to determine whether the investment is unitary. Others, including Virginia, Missouri, Arkansas and Florida, analyze the relationships between the payor and recipient of investment income. This variation in approach does not create a conflict that needs to be resolved by this Court for "the unitary business concept is . . . not, so to speak, unitary: there are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach." *Container,* 463 *U.S.* at 167.

The ultimate question is whether a particular investment is sufficiently connected to a taxpayer's otherwise unitary business to "render . . . formula apportionment a reasonable method of taxation." *Id.* at 166. The unique facts of this case establish that Bendix' investment in the stock of ASARCO was sufficiently related to Bendix' unitary business to justify formula apportionment. The fact that other state courts, on quite different facts, have found insufficient connections to justify apportioned taxation of investment income is not grounds to grant plenary review here. In an area as intensely factual as this one, the Court's general guidelines, set down in the early 1980's in *Mobil Oil Corp. v. Comm'r of Taxes,* 445 *U.S.* 425 (1980), through *Container,* permit the states to adapt the unitary business principle to their particular statutory schemes and particular sets of facts. Where, as here, the

result is "within the realm of permissible judgment," there is no need for this Court's involvement. *Container,* 463 *U.S.* at 176.

POINT II

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPREME COURT OF NEW JERSEY IS CONSISTENT WITH THIS COURT'S DECISIONS.

In maintaining that the decision of the New Jersey Supreme Court is incompatible with prior decisions of this Court, petitioner overlooks the import of the Court's most recent decision on the unitary business issue in *Container* and the factual differences between this case on the one hand and *ASARCO* and *Woolworth* on the other.

In *Container,* the Court held that Container Corporation and its subsidiaries were engaged in a unitary business despite the absence of day-to-day operating control and "a substantial flow of goods" between parent and subsidiaries. *Container,* 463 U.S. at 177-180 and *n.* 19. The significant fact distinguishing Container's relations with its subsidiaries from Woolworth's relations with its subsidiaries in the *Woolworth* case was the fact that Container's management of the subsidiaries was grounded in its "operational expertise and its overall operational strategy." *Container,* 463 U.S. at 180 *n.* 19. In *Container,* this operational link between the parent's business and its investments in the subsidiaries provided the necessary "sharing or exchange of value not capable of precise identification or measurement – beyond the mere flow of funds arising out of a passive investment or a distinct

business operation . . . . " *Id.* at 166. The *Container* test ("some sharing or exchange of value") clarifies the holdings in *ASARCO* and *Woolworth* by establishing that active operational control and substantial flows of goods are not the only indicia of a unitary business. *Cf.* *ASARCO*, 458 *U.S.* at 322-24; *Woolworth*, 458 *U.S.* at 362, 364-67.

Additionally, the facts in *ASARCO* and *Woolworth* were quite different from those presented here. In *ASARCO* the trial court had found that "ASARCO's stock investments were 'not integral to nor a necessary part of [ASARCO's] business operation . . . . '" *ASARCO*, 458 *U.S.* at 324 *n.* 21. As the Court was careful to point out, the facts before it differed "in critical respects" from those found in *Mobil*. *Id.* at 326 *n.* 22. There was insufficient proof in *ASARCO* that the investments were an integral part of ASARCO's operational strategy, and thus the record did not support Idaho's claim.

The record in *Woolworth* in support of the state's position was even less persuasive. There appear to have been virtually no proofs relating to Woolworth's business, its operations in New Mexico, the management of its subsidiaries, or the integration of the subsidiary investments into Woolworth's operations. *Woolworth*, 458 U.S. at 359 *n.* 7. On the records before it in *ASARCO* and *Woolworth*, the Court could not have found that the investments were so integrated with the taxpayer's day-to-day business operations that they should be treated as unitary investments.

When the New Jersey Supreme Court stated that Bendix "had a business function of corporate acquisitions

and divestitures that was an integral operational activity" (App. A at 18a - 19a), it was applying the *Container* test and relying on a record that demonstrates the existence of an acquisitions strategy beginning as early as 1965 and culminating with the demise of Bendix as a separate company, an operational strategy that permitted the company to diversify, to become more profitable, and to grow. *Container*, 463 *U.S.* at 180 *n.* 19. For instance, Bendix' acquisitions from 1965 through 1969 ranged from the automotive industry (one of the company's original businesses) to the machine tool industry (which by 1978 was part of a major operating group, the industrial-energy group) to unrelated diversifications such as United Geophysical Corporation, Texas Pipe Bending Company, and Skagit Corporation. Moreover, Bendix' Annual Reports to Shareholders frequently articulated the company's strategy of growth and diversification through acquisitions.

The record demonstrates that Bendix' purchase and sale of 20% of the stock of ASARCO was part of the same long-term operational strategy of growth and diversification through corporate acquisitions. Bendix viewed the ASARCO stock purchase as a diversification tending to insulate the company from cyclical trends in the economy, a strategy that the company had articulated and pursued in earlier years, and as an opportunity to expand its natural resources business, a business perceived as offering strong profit possibilities for the future. The stock was sold along with Bendix' other investments in natural resource companies when Bendix determined that its future profits lay in developing the high technology aspects of its business. In short, all of Bendix' investments, including its investment in ASARCO, aided in the

accomplishment of Bendix' operational strategies; none was purely "passive." *Container,* 463 U.S. at 166. All the investments provided flows of value, *id.* at 178, by broadening or diversifying the company's operations.

There is no merit in petitioner's argument that the decision below is inconsistent with decisions of this Court.*

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* Petitioner asserts (Pet. at 22) that New Jersey must establish a relationship between Bendix' activities in New Jersey and Bendix' investment in ASARCO. That is not what New Jersey must show. The unitary business analysis proceeds "by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of the world . . . . " *Container,* 463 *U.S.* at 165. If Bendix' activities in New Jersey are part of its unitary business (which no one disputes) and Bendix' investment in the stock of ASARCO is part of Bendix' unitary business, New Jersey may tax an apportioned share of the income arising from the ASARCO investment. *See Amerada Hess Corp. v. Director, Div. of Taxation,* 490 *U.S.* 66, 73 (1989). New Jersey need not show a direct relationship between Bendix' activities in New Jersey and its investment in ASARCO.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: November 15, 1991

APPENDIX

BENDIX CORPORATION, Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 14-24-0504-84-CB Civil Action STIPULATION OF FACTS

. . . .

7. Bendix was incorporated in Delaware in 1929 as a manufacturer of aviation and automotive parts.

8. In 1937, Bendix obtained a certificate of authority to transact business in New Jersey and Bendix was qualified to transact business in New Jersey at all times relevant to this action.

9. In 1983 Bendix became a wholly owned subsidiary of Allied Corporation ("Allied") and was merged into Allied as of April 1, 1985.

10. At all times relevant to this action, Bendix's corporate headquarters and commercial domicile were in Southfield, Michigan.

11. Over the years, Bendix developed into a multinational corporation with activities, either directly or through subsidiaries or other operating units, in all 50 states and 22 foreign countries. Bendix's core businesses expanded along several basic lines so that beginning in 1970 (when the forest products business was acquired)

until 1981 (when the forest products business was sold) there were 4 major Bendix operating groups or sectors (the "Major Groups"): (a) automotive, (b) aerospace/electronics, (c) industrial/energy and (d) forest products. The various Bendix subsidiaries or other operating units were, for operational purposes, included by Bendix in one of the Major Groups based upon the type of business activity engaged in by that subsidiary or operating unit. Each subsidiary or operating unit had its own management which, in turn, reported to the chief executive of the Major Group in which the subsidiary or operating unit was included. The chief executives of the Major Groups reported directly to the chairman and chief executive officer of Bendix.

. . . .

13. The principal products manufactured by Bendix during 1981 are described in Bendix's 1981 annual report attached as Exhibit B. The business of Bendix Forest Products Corp. ("BFPC"), which comprised the bulk of the Bendix forest products business, is described in an excerpt from Bendix's 1979 annual report attached as Exhibit C.

. . . .

28. As described by A. Matthew Lord, Director of Corporate Development in the Bendix planning department, during his tenure in the planning department (1975-1982) Bendix had three major strategies for growth: (1) exploit its existing businesses, (2) move into related areas, and (3) move into unrelated areas with strong growth potential.

29. According to Mr. Lord, the long term goals for the Major Groups were:

> *Aerospace:* Move up on the scale to producing systems and sub-systems rather than products and components.
>
> *Automotive:* Offer more products, particularly in the after market, which is more profitable than the original entry market.
>
> *Forest Products:* Integrate forward and avoid the cyclical problems of the market.
>
> *Industrial:* Look for good growth potential and similar returns in different segments of the market.

30. As part of a shift in strategy which began in 1980 (see ¶¶ 154, 155 hereafter), the Bendix planning department's function included two additional endeavors. The first of these involved the formation of a technical ventures group, which evaluated and recommended certain relatively modest acquisitions in high technology businesses. The acquisition of 20% of Maxwell Laboratories, Inc. for less than $50 million and of E-O Tech were part of the technical ventures program. Not including Maxwell, the total dollar value of the acquisitions in the technical ventures program did not exceed $20 million. The second endeavor was a screening program to select a major acquisition candidate in a high technology business. Over a period of nearly two years, numerous companies were evaluated. One of the companies so evaluated was Martin Marietta Corporation ("Martin Marietta"). The Bendix planning group eventually recommended that Bendix consider the acquisition of Martin Marietta.

. . . .

31. At all times relevant to this action, Bendix's New Jersey activities consisted primarily of the operation of several Bendix units in the Aerospace Group at Teterboro, New Jersey, including Aerospace Flight Systems, Guidance Systems and Test Systems and the manufacture of electric power generating systems at a plant in Eatontown, New Jersey.

. . . .

38. At all times relevant to this action, Bendix also sold, both on a wholesale and retail basis, its full range of products to New Jersey customers and stored inventory in New Jersey at locations owned by others.

. . . .

39. Asarco (formerly known as American Smelting and Refining Co.,) was (and continues to be) a New Jersey corporation with its principal offices in New York, New York. At all times relevant to this action, Asarco was one of the world's leading producers of nonferrous metals, principally copper, lead, zinc and silver and nonmetallic minerals, including asbestos, coal, ilmenite and limestone. In addition to mining and treating ore from its own mines, Asarco at all times relevant to this action was a major custom smelter and refiner of nonferrous metal ores mined by others. Asarco at all times relevant to this action conducted its own operations in the United States, Canada, Peru, and Bolivia, and also had substantial investments in other mining and metals companies through which mining operations were conducted in Australia, Mexico, Nicaragua, Peru and other foreign

countries. These included M.I.M. Holdings Limited of Australia (48.9% owned), Mexico Desarrollo Industrial Minero, S.A. (34% owned), Neptune Mining Company (52.2% owned), Southern Peru Copper Corporation (52.3% owned), and Revere Copper and Brass Incorporated (33% owned).

40. At all times relevant to this matter, Asarco's sole activities (either directly or through subsidiaries) in New Jersey were the ownership of an ilmenite mine in Manchester, New Jersey, manufacturing by a subsidiary of additives, hardeners and other metal products at Newark and Trenton, New Jersey, manufacturing by a subsidiary of bronze rods, tubes, bearings, bushings and parts at Somerville, New Jersey, the rental of a management information service center in Cranford, New Jersey, the sale of its metal products to New Jersey customers and storage of inventory of such metal products at New Jersey locations owned by others. Asarco paid New Jersey corporation business tax with respect to these properties and income.

41. Prior to and after its investment in Asarco, no business or activity of Bendix (in New Jersey or otherwise), either directly or indirectly (other than the investment itself), was involved in the nonferrous metal production business or any other business or activity (in New Jersey or otherwise) in which Asarco was involved. On its part, Asarco had no business or activity (in New Jersey or otherwise) which, directly or indirectly, was involved in any of the businesses or activities (in New Jersey or otherwise) in which Bendix was involved. None of Asarco's activities, businesses or income (in New Jersey or otherwise) were related to or connected with Bendix's activities, business or income (in New Jersey or otherwise).

42. Prior to the decision to invest in Asarco, the Bendix planning department conducted studies of both natural resource companies and the non-ferrous metals industry. A copy of an executive summary of natural resource companies is attached as Exhibit D.

43. Bendix began buying shares of stock in Asarco on the open market in December 1977 and completed its acquisition of 20.6% of Asarco's stock in November, 1978.

44. The reasons for Bendix's interest in a natural resource company are set forth in a memorandum of March 31, 1978 from W.M. Agee to the Long Range Planning Committee of Bendix's Board of Directors entitled "Long Range Growth and Acquisition Planning," a copy of which is attached as Exhibit E. The memorandum was authored by Jerome Jacobsen, head of Bendix's planning department, with review and input from Mr. Agee.

45. The March 31, 1978 memorandum discusses the areas of Bendix's business which have potential for growth and sets forth strategies for growth in three of those areas. The memorandum also focuses on the possible acquisition of a nonferrous metals company and in particular Asarco (called "Blackie" in the memorandum), and provides reasons for acquiring approximately 20% of Asarco's stock. Attached to the memorandum are various supporting documents dealing primarily with the mining industry.

46. The Long Range Planning Committee of the Bendix Board of Directors recommended that the full Board of Directors approve the acquisition by Bendix of approximately 20% of the stock of Asarco.

47. The Board of Directors of Bendix met on April 13, 1978 and was presented with a memorandum dated April 12, 1978 from Mr. Agee requesting approval to purchase 15.1% of the stock of Asarco (4.9% having been previously acquired). A copy of an excerpt from the Bendix Board minutes of April 13, 1978, together with a copy of the memorandum of April 12, 1978 are attached as Exhibit F.

48. In addition to summarizing management's view that Bendix should acquire an interest in a company involved in basic commodities, particularly copper, the memorandum summarized Asarco's attributes, focused on the perceived unique aspects of the Asarco investment, outlined the broad parameters of the transaction, and set forth certain financial aspects of the investment.

49. Following presentation of the April 12, 1978 memorandum, the Bendix Board of Directors approved by resolution the acquisition of up to 21% of the stock of Asarco. A copy of the resolution is attached as Exhibit G.

50. Pursuant to a Stock Purchase Agreement dated as of April 13, 1978 (the "Agreement"), Asarco agreed to sell to Bendix 3,800,000 shares of Asarco stock. A copy of the Agreement is attached as Exhibit H. Under the terms of the Agreement, Bendix agreed that prior to January 1, 1985 it would not either directly or through subsidiaries and affiliates hold in the aggregate more than 21% of the voting stock of Asarco. Further, Bendix agreed that in the event prior to January 1, 1985 it desired to sell 1,000,000 or more shares of its Asarco stock, it would provide to Asarco a right of first refusal at a price and on terms set forth in the Agreement. Additionally, Bendix agreed that

prior to January 1, 1985 it would not solicit or permit any of its subsidiaries or affiliates to solicit proxies with respect to its Asarco stock or be, or permit any of its subsidiaries and affiliates to be, a "participant" in any "election contest" relating to election of directors of Asarco (as such terms are used in Rule 14a-11 of Regulation 14A under the Securities Exchange Act of 1934). The Agreement was to be governed by New Jersey law.

51. Through a series of further purchases either under option contracts or in the open market, Bendix acquired additional shares of stock of Asarco so that upon completion of all purchases it eventually owned 20.1% of such stock. Bendix maintained its investment in Asarco at a constant level of 6,106,900 shares which, upon retirement by Asarco of outstanding shares, became equal to 20.6% of Asarco's outstanding stock.

52. The total purchase price paid by Bendix for 20.6% of Asarco's stock was $127,649,017. The purchase price was paid by Bendix in cash, with $110 million of this purchase price being borrowed by Bendix under line of credit arrangements with its bank lenders. The balance of the cash purchase price was derived from internally generated funds.

53. While Bendix held the Asarco stock, Asarco agreed to recommend that two seats on Asarco's fourteen-member Board of Directors be filled by Bendix's representatives. These seats were filled by Mr. Agee and Malcolm Baldridge, a Bendix outside director.

54. Bendix did not exert any control over Asarco.

55. Because Bendix owned at least 20% of Asarco's stock, it was able to account for the investment under the equity method. Under this method, Bendix included in its income the share of Asarco's total earnings equal to Bendix's percentage of Asarco's stock, *i.e.*, 20.6%.

56. In order to report its investment in Asarco on the equity method, every fiscal quarter two or three individuals from Bendix's controller's department would visit Asarco's headquarters in New York and review Asarco's books and, at other times throughout the year, financial materials were supplied by Asarco to Bendix over the telephone or through the mails.

57. The Bendix Board of Directors met approximately five to six times a year. At every Board meeting during the period Bendix held at least 20% of Asarco, there was a report to the Board on Asarco's earnings. Copies of the relevant portions of certain Board minutes and Mr. Agee's reports to the Bendix Board on the Asarco investment at the meetings of October 26, 1978, February 12, 1979, April 26, 1979, June 18, 1979, October 25, 1979, January 31, 1980, April 24, 1980, June 26, 1980 and August 28, 1980 are attached as Exhibit I.

58. Over the years Bendix held its investment in Asarco, the economic outlook for the nonferrous metal industry greatly improved and the trading price of Asarco's stock increased as did its dividend payments.

59. The October 25, 1979 status report on the Asarco investment stated that Asarco contributed 82 cents per share to Bendix's earnings for Bendix's fiscal year ended September 30, 1979. Bendix's total earnings per share for fiscal year 1979 were $7.10.

60. The August 28, 1980 status report estimated that Asarco would contribute $2.22 per share to Bendix's 1980 earnings. Bendix's total earnings per share for fiscal year 1980 were $7.68.

61. With the approval of Bendix's Board, in September 1979, W.M. Agee made a proposal to Asarco's Board of Directors that the two companies consider a merger or other business combination. Asarco's Board did not wish to pursue discussion of any such transaction.

62. During the period that Bendix held its investment in Asarco, Bendix and Asarco were unrelated business enterprises each of whose activities had nothing to do with the other. As examples of this independence:

- There were no common management, officers, or employees of Bendix and Asarco.
- There was no use by Bendix of Asarco's corporate plant, offices or facilities and no use by Asarco of Benidx's corporate plant, offices or facilities.
- There was no rent or lease of any property by Bendix from Asarco and no rent or lease of any property by Asarco from Bendix.
- Bendix and Asarco were each responsible for providing their own legal services, contracting services, tax services, finance services and insurance.
- Bendix and Asarco had separate personnel and hiring policies . . . and separate pension and employee benefit plans.
- Bendix did not lend monies to Asarco and Asarco did not lend monies to Bendix.

- There were no joint borrowings by Bendix and Asarco.

- Bendix did not guaranty any of Asarco's debt and Asarco did not guaranty any of Bendix's debt.

- Asarco had no representative on Bendix's Board of Directors.

- Bendix did not pledge its Asarco stock.

- As far as can be determined there were no sales of product by Asarco itself to Bendix or by Bendix to Asarco. There were certain sales of product in the ordinary course of business by Asarco subsidiaries to Bendix but these sales were minute compared to Asarco's total sales of $1.7 billion in 1979 and $1.8 billion in 1980. The amounts of these sales are set forth in Exhibit J. These open market sales were at arms length prices and did not come about due to the Bendix investment in Asarco.

- There were no transfers of employees between Bendix and Asarco.

63. In the fall of 1980, Bendix publicly announced that it was considering the possibility of selling its stock in Asarco. On October 7, 1980, Mr. Agee reported to the Bendix Board of Directors on his discussions with Asarco concerning the possible sale of Bendix's stock in Asarco to Asarco. While two members of the Bendix planning department testified that they did not conduct studies involving disposition of the Asarco investment, the Board was presented with and discussed materials presented by a managing director of Lehman Brothers concerning a possible sale of Bendix's stock in Asarco. The Bendix

Board then authorized Mr. Agee to enter into an agreement to sell all or a portion of the Asarco stock at no less than $53 per share. A copy of an excerpt from the Bendix Board minutes of October 7, 1980 and an excerpt of the materials presented by Lehman Brothers are attached as Exhibit K.

64. Among the reasons for selling Bendix's interest in Asarco were (i) Bendix had decided to reduce its investment in businesses tied to natural resources such as BFPC and Asarco, and (ii) Bendix's investment in Asarco had appreciated considerably.

65. Asarco had a right of first refusal under the Agreement if Bendix desired to sell more than 1,000,000 shares of stock of Asarco. Upon negotiations with Bendix, Asarco agreed to repurchase its stock from Bendix.

66. On October 29, 1980, Bendix and Asarco entered into an agreement under which Asarco agreed to repurchase the shares owned by Bendix at $55 per share. The sale agreement was to be governed by the laws of New Jersey, and the closing was to occur in Morristown, New Jersey, at the offices of counsel of Asarco.

67. In the first half of 1981, Bendix sold its 6,106,900 shares in Asarco back to Asarco at $55 per share for a total sale price of approximately $335,879,500, of which approximately $211,500,000 was the long term capital gain at issue in this matter.

. . . .

69. In 1965, Bendix purchased 100% of the stock of UGC for stock in Bendix valued at approximately $6.2 million. Bendix sold 100% of the stock of UGC in July

1981 to Seiscom Delta, Inc. for cash amounting to approximately $80 million.

70. The purchase by Bendix of UGC was part of an effort by Bendix to diversify. It was also hoped that the business of UGC would complement existing Bendix oceanic endeavors. Bendix's 1965 Annual Report to Shareholders states at page 3:

> We have accelerated our acquisitions program. Here our objective is not merely diversification. We intend to achieve a better balance of our military and commercial-industrial product sales. We intend to enhance and improve our competence in the fields where Bendix's leadership and talents are acknowledged by acquiring strong units that are supplementary. In May [1965] we acquired the United Geophysical Corporation. This well-established organization is active world-wide in providing geophysical services to oil companies. Complementing our substantial oceanics endeavors, this acquisition will enable us to participate more fully in geophysical operations for petroleum and other minerals on a global basis.

71. UGC was in the business of seismic surveying, which involves the creation of underground acoustical waves through blasting or mechanical means and the recordation and interpretation of the wave patterns for purposes of locating oil and gas. A more detailed description of UGC's business is set forth in a draft prospectus dated June 18, 1981, an excerpt of which is attached as Exhibit L. UGC's principal customers were oil and gas companies.

72. UGC transacted no business in New Jersey.

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73. Prior to acquiring UGC, neither Bendix nor any subsidiaries or affiliates were involved in the business of seismic surveying.

. . . .

117. Bendix placed the proceeds from the sale of its 20.6% interest in Asarco and its stock in UGC in an interest bearing investment account (the "Account") with Lehman Brothers. The Account was administered, and all securites on deposit were located, outside of New Jersey.

. . . .

124. In Late January 1981, Bendix made a public offer, valid until February 27, 1981, to purchase up to 4,000,000 of its shares at $64 per share and reserved the right to purchase an additional 1,000,000 shares.

125. As reflected in the filings made by Bendix with the Securities Exchange Commission in connection with this offer, the source of funds for the purchase of shares was the proceeds of Bendix's sale of its interest in Asarco and various subsidiaries.

126. Withdrawals from the Account in March and early April, 1981 were most likely used to pay for Bendix's purchase of its stock.

127. Bendix spent a total of $257.5 million on the purchase of its shares.

. . . .

128. Over the years Bendix engaged in selective acquisitions and divestitures of companies or assets of companies. While there were different reasons for each Bendix acquisition or divestiture, a major theme in this

area, as expressed by Mr. Lord, a senior member of the Bendix Planning 'Department during Mr. Agee's tenure, was whether an acquisition or disposition would enhance the existing product areas of Bendix. For example, a logical off-shoot of the businesses engaged in by the Automotive Group was the acquisitions of Fram Corporation (which made automotive oil and air filters) and Autolite (which made spark plugs). These two acquisitions were designed to expand Bendix's reach into the automobile "after market". Intended to broaden Bendix's product offering in the automotive field was the acquisition of Toledo Stamping and Manufacturing Company, a producer of engine rocker arms. The acquisition of Warner & Swasey Company enhanced Bendix's position in the machine tools business.

129. While Bendix owned BFPC, its forest products business, acquisition of Bass & Co. (retailer of specialty building materials), Caradco (maker of wood windows and doors), Modern Materials (maker of aluminum building products) and Coin Millwork (maker of moldings) was accomplished because these companies were involved in the manufacture, sale and distribution of products that utilized forest products as raw materials.

130. Bendix, on occasion, invested in or made an acquisition in business areas in which it had no existing specific involvement. Examples of this sort of activity included the purchase of UGC, BFPC, Skagit Corporation and the Asarco minority stock interest.

131. Suggestions for acquisitions or divestitures might come from various sources from within Bendix

including a group or division's/strategic plan, the planning department or from senior management. If an acquisition or divestiture was considered, the analysis of the impact of that transaction upon Bendix and the relative merits thereof might be performed by the division or group from which the idea emanated or by the Bendix planning department. The controller's department generally would conduct financial analysis of the proposed transaction. Once all analysis and evaluation of the transaction were completed, the proposal would be presented to the chairman for review. No acquisition proposal or divestiture could be presented to the Bendix Board of Directors without the approval of the chairman.

132. Bendix's 1966 Annual Report to Shareholders lists the following acquisitions at page 5. (The acquisition's principal business is indicated in parentheses):

- Besly-Welles Corporation (grinding machines and metal cutting tools)
- P & D Manufacturing Company, Inc. (automotive ignition parts)
- Fonda Gage Company (precision gage blocks for the metalworking industry)
- Beck-Lee Corporation (medical electronics equipment for doctors)
- Scully-Jones Company (tool holders and cutting tools for machine tools)
- Marine Advisors, Inc. (applied oceanography)
- Mosaic Fabrications, Inc. (fiber optics producer)

133. Bendix's 1967 Annual Report to Shareholders lists the following acquisitions at page 9:

- Fram Corporation (manufacture and sale of filters for internal combustion engines)
- Macklin Co. (grinding wheels for the automotive, glass, and steel industries)
- Titan Abrasives Company (abrasive grinding disks for the cutting tool industry)
- Industrial Fabricating Company (heat exchangers)
- Texas Pipe Bending Company (minority interest; manufacturer of welded pipe for refineries, chemical and petrochemical plants)

134. In 1967 Bendix disposed of its Marine Division.

135. Bendix's 1968 Annual Report to Shareholders lists the following acquisitions at page 30:

- Fram Corporation purchased the shares of Superior Machine & Tool Co. (manufacturer of tools and dies).
- Certain assets of Roberts Toledo Rubber Co. (molded rubber products).
- Consolidated Vacuum Corp. (vacuum systems for industrial processing and scientific and research laboratories).
- Fram Corporation purchased Mercury Filter Corp. (industrial air filters).
- Geo Prospectors, Inc.

136. The Chairman's letter in Bendix's 1969 Annual Report to Shareholders recounts the history of Bendix

which began as an aviation corporation supplying military systems, and states:

> Recognizing the vital necessity to broaden the base of our business so as to be less dependent on the government sector, we intensified our efforts to expand in other commercial and industrial markets.

Page 4 of the same Report states:

> Acquisitions have played a significant role in the growth of your Corporation during the past decade.

137. Bendix's 1969 Annual Report to Shareholders lists the following acquisitions at page 13:

- Buhr Machine Tool Company (automatic transfer machines).

- American Abrasive Company (abrasive grains, powders and wheels).

- Skagit Corporation (logging equipment and systems and other handling equipment).

- Fram Corporation purchased Superior Filter Glass Corporation.

- Remaining 49% of the stock of Bendix-Westinghouse Automotive Air Brake Co.

- Remaining stock in Aviation Electric Ltd.

138. During 1969 Bendix disposed of:

- Computing Devices of Canada Ltd.

- Bendix's Semiconductor Division

- UGC sold its Houston data center

– Bendix's Scientific Instruments and Equipment Division sold its dosimeter business.

139. The Chairman's message in Bendix's 1970 Annual Report to Shareholders states that Bendix merged with American Forest Products Corporation during that year. This was Bendix's largest acquisition to date and represented a new market for Bendix. American Forest Products Corporation was in the timber management, lumber, building materials, wood and corrugated containers, and aluminum siding businesses.

140. Bendix's 1971 Annual Report to Shareholders at page 33 mentions six relatively small acquisitions during the year and the acquisition of 50% interests in two European companies.

141. The Chairman's message in Bendix's 1972 Annual Report to Shareholders states that Bendix is pursuing "broad corporate strategies to further increase the non-government segment of our business, to pursue the diversification of our major lines of business, to expand our role in non-cyclicial or counter-cyclical markets and to increase our international involvement."

142. During 1973 Bendix acquired Boise Cascade's international mobile home and recreational vehicle businesses and reorganized these activities as Bendix Home Systems. During calendar year 1973 Bendix acquired the Autolite spark plug manufacturing facility and the Autolite trademark from the Ford Motor Company.

143. Bendix's 1973 Annual Report to Shareholders at page 1 discusses "the principle of diversification" and

states that Bendix's markets and products "are not necessarily on the same business cycles." The 1973 Report states further at page 1:

> We also continued our policy of disposing of minor operations which do not relate to our long-range business strategy.

144. Bendix's 1975 Annual Report to Shareholders states at page 8 that one of the principles followed at Bendix "has been the careful diversification of the Company into four broad lines of business – automotive, aerospace-electronics, industrial-energy and shelter."

145. The 1975 Annual Report states that pursuant to an order of the Federal Trade Commission certain operations of Bendix and Fram Corporation were transferred to a new subsidiary, Facet Enterprises, which would be divested no later than November 1976.

146. The letter to shareholders in Bendix's 1976 Annual Report states that Bendix's earnings record in the fifties and sixties was "spotty" due to excessive dependence on government work and on "the cyclical ups and downs of the industries [Bendix] served".

147. Bendix's 1977 Annual Report to Shareholders states in the letter to stockholders that "we have pursued a deliberate policy of diversification both within and among our lines of business, and geographically as well, in an effort to arrive at a combination of activities that helps insulate the company as a whole from the ups and downs of any one of them." Page 3 of the Report states that Bendix's acquisitions program has been a source of growth. This was the first of Mr. Agee's reports as chairman of Bendix. The Report notes at page 2 that one of the

keys to Bendix's reputation for reliability and high quality is its technological strength. During 1977 Bendix acquired Coin Millwork, a maker of wood moldings.

148. The chairman's report in the 1978 Annual Report to Shareholders states that Bendix has "successfully pursued a strategy of diversification that has brought us resistance to the ill effects of swings in the business cycle. First, we are in four major businesses: automotive, aerospace-electronics, forest products, and industrial-energy. Second, within each of these, we are also diversified."

149. During 1978, Bendix acquired Toledo Stamping and Manufacturing Company, a manufacturer of engine rocker arms for cars and trucks, and two small companies manufacturing components in the aerospace-electronics area of Bendix's business and sold the North American Manufactured home and recreational vehicle operations of Bendix Home Systems.

150. The chairman's report in Bendix's 1978 Annual Report to Shareholders reports the "single largest investment" in the company's history – the acquisition of 18.4% (ultimately to become 20.6%) of the shares of Asarco. Page 8 of the Report states that the acquisition of an interest in Asarco "strengthens Bendix for the 1980's with a substantial diversification into nonferrous metals and minerals."

151. The letter to stockholders in Bendix's 1979 Annual Report to Shareholders states at page 3 that one "strong element" in Bendix's strategy has been "a policy of diversification aimed at insulating the Company's total profitability from the cyclical troubles of any particular

industry or business" and that another element in the strategy has been a "careful effort to seek out the high return, high-growth segments of the markets [Bendix] serve[s]."

152. During 1979 Bendix acquired Bass & Company, a producer and distributor of building materials, and the Caradco Division of Scoville, a producer of windows and sliding doors.

153. During 1980 Bendix acquired Warner & Swasey Company, a machine tool manufacturer for $300.7 million, Bendix's largest acquisition to date, and sold Skagit Corporation for $28.3 million.

154. In 1980 there occurred certain changes in strategy at Bendix. The basic thrust of this revised strategy was to focus more heavily upon the high technology aspects of Bendix's existing businesses and to examine acquisitions of companies in high technology businesses that either might complement those existing Bendix businesses or represent an entry into new areas. In addition to these efforts, Bendix established an Advanced Technology Center to undertake basic research and exploratory development.

155. As part of this shift in strategy, there was a reevaluation by Bendix of its natural resource group which included BFPC, UGC and other companies and, for administrative purposes only, the Asarco investment. It was determined that continued involvement in these industries was not necessarily consistent with Bendix's desire to concentrate more significantly on developing its own technological capabilities and on companies which would assist in that effort.

156. Consistent with these decisions and the shift away from the natural resource businesses, during its 1981 fiscal year (10/1/80-9/30/81), Bendix disposed of or agreed to dispose of:

- BFPC for $435 million.
- UGC for $80 million.
- Bass, Caradco, and Modern Materials for a total loss of $12.5 million.
- Its 20.6% stock interest in Asarco for $336 million.

157. The sale of BFPC was consistent with Bendix's determination to reduce its involvement in businesses tied to natural resources.

158. Bendix's 1980 Annual Report to Shareholders states in the chairman's message:

> Our investment in the forest products business and Asarco were made in line with our policy of diversification as an insulator against the cyclicality of any particular business . . .
>
> When consummated, the sale of the forest products business and our interest in Asarco will reflect the basic soundness of investing in them originally; will increase the company's financial strength substantially; and will leave us well positioned to make prudent investments in the future of Bendix. As always, the overriding criteria for new investments will be the maximization of stockholder value.

159. The Chairman's letter in Bendix's 1981 Annual Report to Shareholders states at page 6:

> Finally, our redeployment of assets through our divestment program also contributed significantly to net income in 1981. We completed our plan for major divestments with the sale of our forest product business, our interest in Asarco Incorporated, and the stock of our subsidiary United Geophysical Corporation.

160. The 1981 Annual Report to Shareholders states at page 7 that the net gains from Bendix's various divestments "allowed the company to purchase some four million shares of our own stock which should enhance future shareholder value."

161. The cash proceeds from the various sales which took place in fiscal year 1981, created liquidity and additional debt capacity to enable Bendix to be in a position to make a sizable acquisition if an appropriate acquisition candidate materialized.

162. On August 24, 1982, Mr. Agee requested authorization from the Bendix Board to make a public offer to purchase up to 50% of the shares of Martin Marietta, with the intent of acquiring the remaining 50% in exchange for Bendix shares. Attached as Exhibit U is a copy of Mr. Agee's memorandum of August 24, 1982 proposing acquisition of Martin Marietta (called "Georgia" in the Exhibit). Bendix subsequently increased its offer to purchase up to 70% of Martin Marietta's stock.

163. Martin Marietta's principal business was aerospace related, where it was a prime contractor producing entire systems, with a strong involvement in the production of missiles. Bendix had an aerospace group with a

primary focus in aircraft, and was primarily a subcontractor of component parts. Bendix believed the businesses of Martin Marietta and Bendix were complementary.

164. Bendix purchased approximately 70% of the stock of Martin Marietta. The total cash purchase price for the Martin Marietta stock was slightly in excess of $1 billion and, with the assumption of Martin Marietta's debt, approached $1.5 billion. According to Bendix's 1982 Annual Report to Shareholders, Bendix incurred additional debt of $793.7 million and, decreased its cash and marketable securities by $424.1 primarily as a result of its purchase of the common stock of Martin Marietta.

165. Although Bendix succeeded in acquiring approximately 70% of Martin Marietta's shares, it was unable to call a meeting of the Martin Marietta shareholders before Martin Marietta acquired 50.3% of Bendix's shares. Allied then (1) purchased all the Bendix shares owned by Martin Marietta, (2) purchased all the Martin Marietta shares held by Bendix and (3) resold a large portion of the Martin Marietta shares to Martin Marietta. Allied then acquired the remaining Bendix shares through a merger, and Bendix became a wholly owned subsidiary of Allied.

[Signatures of counsel and dates]